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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 818

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

Petitioners,

vs.

CITY OF NEWARK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS AND BRIEF IN SUPPORT THEREOF.

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No.

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF, as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

Petitioners,

vs.

CITY OF NEWARK,

Respondent.

Petition for Writ of Certiorari.

The petitioners respectfully show:

1.

Chronology.

This matter had its inception in a petition by the relators below for an alternative or peremptory writ of mandamus requiring the respondent below, City of Newark, to apply to a Justice of the Supreme Court of the State of New Jersey at the Circuit of said Court in and for the County of Essex for the appointment of three commissioners to ascertain the damages suffered by the relators below by reason of the taking of their land, by the City of Newark (R. 23).

The petition was supported by the affidavit of George C. Shipman, sworn to on March 14th, 1934 (R. 36), and by the affidavit of Nathan Kussy, Esq., sworn to on May 29th, 1934 (R. 46). Said petition and supporting affidavits were filed on June 12th, 1934.

On the 9th day of June, 1934, Mr. Justice Parker, one of the Justices of the New Jersey Supreme Court, made and granted a rule requiring the respondent below to show cause why an alternative or peremptory writ of mandamus should not issue as prayed for in the petition herein (R. 51), which rule was filed on June 12th, 1934.

Subsequently George C. Shipman, one of the relators, died, and the co-relators, Anna S. A. Graf and August Graf, individually, and said August Graf, as Executor of the Will of George C. Shipman, deceased, were substituted as parties relators in the place and stead of George C. Shipman, deceased, by an order duly made on November 16th, 1937 (R. 52), and the said order was thereafter duly filed.

By stipulation filed April 28th, 1939, counsel for the parties hereto agreed to submit the matter to the Court upon an agreed statement of facts, and briefs (R. 53).

The matter was submitted to the Court upon an agreed statement of facts, and briefs, at the October, 1939, Term thereof (R. 54).

On March 16th, 1940, the Court rendered its opinion, finding adversely to the relators below (R. 7), and directed that the rule to show cause be discharged.

On April 13th, 1940, a rule was made discharging said rule to show cause, and the same was filed on April 25th, 1940 from which no appeal would lie.

On December 12th, 1941, the relators below made application to Mr. Chief Justice Brogan, and Associate Justices Donges and Porter, at Trenton, the same Justices by whom the matter had been considered at the October,

1939, Term, for leave to mold pleadings so as to permit an appeal. This motion was granted, and on January 13th, 1942, an order was made permitting the molding of pleadings so as to contain an alternative writ of mandamus, a return thereto by the respondent, a demurrer to said return by the relators, a joinder in demurrer by the respondent, and a rule overruling the demurrer and directing the entry of final judgment from which an appeal might be taken (R. 13), and upon said rule overruling the demurrer a final judgment was entered herein in favor of the respondent below and against the relators below (R. 11), from which and from each and every part thereof, the relators below took an appeal to the New Jersey Court of Errors and Appeals (R. 3), which Court is composed of 16 judges; viz: the Chancellor, the nine Justices of the New Jersey Supreme Court and six Lay Judges, except that the three Supreme Court Justices who heard and decided the cause in the Court below do not hear or decide the matter of the appeal thus leaving the hearing and decision of such appeal to a bench of thirteen judges who, in the instant case were the Chancellor, six Supreme Court Justices and six Lay Judges.

On September 18th, 1942 the said Court of Errors and Appeals affirmed the judgment of the Court below by a per curiam opinion concurred in by seven and dissented to by three judges, three judges not voting (R. 3).

Of the seven judges voting for affirmance, one was the Chancellor, two were Supreme Court Justices and four were Lay Judges, and of the three judges dissenting, two were Supreme Court Justices and one was a Lay Judge.

On October 15th, 1942, a rule for judgment of affirmance and remittitur was duly entered (R. 2).

The judgment of the said Court of Errors and Appeals affirming the judgment of the New Jersey Supreme Court,

by precedent, creates a law of the State of New Jersey which is repugnant to and violative of the Constitution of these United States of America in that said law, so created:

(a) Allows the taking of private property for a public use without just compensation.

(b) Deprives these petitioners of their property without due process of law.

(c) Impairs the obligation of an existing contract thereby divesting the petitioners of their property and property rights and their vested interest therein.

Statement of the Matter Involved.

A company known as the Morris Canal and Banking Company was incorporated in the year 1824 under an act entitled: "An act to incorporate a company to form an artificial navigation between the Passaic and Delaware rivers" (Laws of 1824, p. 158) (App. 65), by which the company was authorized to construct a canal to connect the waters of the Delaware River near Easton with the tide waters of the Passaic River (R. 56).

Said Act conferred upon the company so created the power of eminent domain, as well also as the right to take by purchase or gift any and all lands necessary and proper to be taken and occupied for the uses and purposes of the canal, and said company was limited in the acquisition and holding of land to such lands only as were necessary and proper for canal purposes (R. 57).

The petitioners are heirs at law and survivors in interest of Charles T. Shipman, who in the year 1830, at the date of the conveyance to the Morris Canal and Banking Company hereinafter referred to, was the owner of a one-half interest in the premises hereinafter described; the

other tenants in common of said property being Abraham W. Kinney, owner of a one-eighth interest, John C. Hedenberg, owner of a one-eighth interest, and Andrew Rankin, owner of a one-fourth interest therein (R. 54).

At the time of its incorporation the Morris Canal and Banking Company owned no property, but by said act was simply to acquire in one of the manners aforesaid such land only as was necessary for the construction and operation of said canal.

By an instrument in writing, under their hands and seals, dated January 9th, 1830, the said Charles T. Shipman, Abraham W. Kinney, John C. Hedenberg, and Andrew Rankin, conveyed to the Morris Canal and Banking Company, in consideration of Three ($3.00) Dollars and other considerations, the premises described in the deed which is set out at length in the agreed statement of facts (R. 55), and the said conveyance in its habendum clause contained the conditional limitation "so long as" the same shall be used for the purposes for which the Morris Canal and Banking Company has power to use the same by the true intent and meaning of the said Act (R. 56).

By deed dated and acknowledged May 29th, 1830, and recorded December 1st, 1830, the said John C. Hedenberg, and Telezeale, his wife, conveyed to Charles T. Shipman, in consideration of Three hundred ($300) Dollars their undivided one-eighth interest in said premises, and by deed dated November , 1830, Luther Goble and Phoebe Goble, his wife, conveyed to said Charles T. Shipman, in consideration of Six hundred ($600) Dollars, their undivided one-fourth interest in said premises, whereby the said Charles T. Shipman acquired title to and became the owner of the equal undivided seven-eighths part and interest in said premises (R. 56).

Section 25 of said Act provided "that the said canal,

when completed, shall forever thereafter be esteemed a public highway, free for the transportation of any goods, commodities, or other produce whatsoever, on payment of the tolls, and conforming to the regulations made or authorized by this Act" (App. 80, R. 57).

Section 26 of the said Act provided that at the end of ninety-nine years from the passage of the Act it should be lawful for the State to take to itself, and on its own account, the canal and its appurtenances, upon paying to the company the fair value thereof to be estimated and fixed by a Commission chosen by the State and the Company, "or in case that shall not be done at that time or within one year thereafter, this charter shall continue so far as respects its canal operations and privileges for the further term of fifty years, when it shall cease and the said canal with its appurtenances become the sole property of the State" (R. 57). (App. 81).

Section 27 of said Act specifically provided that "it shall be so construed that the said corporation shall not be authorized to take or appropriate to the use of said canal or under color or pretense that the same are necessary therefor, any lands, waters or streams of water, but such only as are actually necessary for the erection and use of said canal for the purpose of navigation only and its necessary towing paths and works as specified by the fifth section of this Act (which authorizes the company to construct the canal, together with locks, toll houses, etc.), and that the said corporation shall not be authorized to demise, grant, alien, or sell any such lands, waters or streams, taken or pretended to be taken or acquired for the use of said canal as aforesaid, or any part thereof, to any person or persons whomsoever (excepting only such lands as may be received by them by donation or acquired by them under private contract) and that the said corporation or any other person shall not be authorized to use or appro-

priate any part of said waters for mills or any other purpose than the mere navigation of said canal" (App. 81 R. 57).

In the year 1922 an Act was passed by the Legislature of the State of New Jersey (Laws of 1922, p. 367) entitled: "An Act to authorize the acquisition by the State of the Morris Canal (as defined in this Act) in whole or in part and all of the stock of the Morris Canal and Banking Company and the rights of all stockholders in said Company and in said canal property and water rights, and all or any part of the right, title and interest of the Lehigh Valley Railroad Company in said canal property and water rights by virtue of its lease of the said canal from the Morris Canal and Banking Company or otherwise; to provide for a commission authorized to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company in relation to the said canal property and water rights; and to vest in said commission certain powers necessary for the carrying out of the terms of settlement and to make such other provisions as may be necessary to effectuate the objects aforesaid" (App. 82, R. 57).

Pursuant to said last mentioned Act a commission was appointed and did conduct negotiations with the Morris Canal and Banking Company, and its lessee, Lehigh Valley Railroad Company, and as a result of such negotiations the said Morris Canal and Banking Company and the Lehigh Valley Railroad Company in 1923 conveyed to the State of New Jersey lands and rights of way embracing the canal property running through the State of New Jersey, including the premises in question (App. 88, R. 58). Subsequently, by Act of the Legislature (Laws 1923, p. 34) it was provided that the title to the property acquired or to be acquired by the State of New Jersey shall be vested in the Morris Canal and Banking Com-

pany, in trust for the State of New Jersey (App. 101, R. 58).

By an Act passed the following year (Laws 1924, Ch. 78, p. 151) it was provided that, upon the abandonment by lawful authority of navigation upon the Morris Canal, the City within which any canal property is located might acquire for public use such parts of the canal property as might be located within its boundaries (App. 103, R. 58).

Said act further provides in Section 3 thereof: "Any municipality, county or counties which shall purchase any of such property may acquire by gift, purchase or condemnation any reversionary and any other private rights in the property so purchased" (App. 104).

In the same year (Laws 1924, Ch. 229, p. 506), the Morris Canal and Banking Company was authorized and directed (by Section I of said Act) to discontinue the use as a means of transportation by water of that portion of the property which had theretofore been used for such purpose (including the premises in question), and authorized the company to drain off the water from the canal and feeders. It further provided that "such portions of such property shall be applied and are hereby dedicated to the public use as public highways for the transportation and passage thereon of persons and property and for any and all further purposes of such highways." It further authorized said company (Section 4 of said Act) to sell to the municipalities through which the canal passed the portions of the canal situated within their respective boundaries, and provided further that, upon the purchase of any such property by any municipality for public use, the property so purchased shall be applied to such public use or uses, or some of them, and such public use or uses shall supersede any other or different public use to which such property may have been there-

tofore dedicated (Laws of 1924, p. 508) (App. 106, R. 59).

By deed dated June 4th, 1927, and recorded in Book Y-76 of Deeds for Essex County, pages 381, *et seq.*, the Morris Canal and Banking Company acting in the name of and as trustee for the State of New Jersey, conveyed to the City of Newark all of the right, title and interest of the Morris Canal and Banking Company and the State of New Jersey in and to the canal property within its borders, including the premises in question (R. 59), and thereafter the City of Newark entered upon said lands and asserted title thereto, and entered into a contract with Public Service Coordinated Transport, a corporation of the State of New Jersey, operating an extensive system of electric street railways, whereby the said City of Newark agreed to construct a double track electric railway along a portion of the canal property, including the premises in question, upon which the railway company was granted the right to enter and enjoy the exclusive right to operate the same (R. 59).

Upon the abandonment of the canal, the lands conveyed by Shipman and others to the Morris Canal and Banking Company, by the terms of the deed of conveyance, reverted to the petitioners, and they are now the true and lawful owners of such lands and entitled to the possession thereof. The respondent, City of Newark, in total disregard of the rights of the petitioners, has taken and now holds the possession, use and occupancy of said lands to the exclusion of the rights of the petitioners, and to their damage, and it is the lawful duty of the respondent, City of Newark, to ascertain in a legal manner the extent of the damages sustained by the petitioners by reason of such unlawful taking and withholding of said land and to pay such damages. The respondent, City of Newark, now holds and occupies said lands adversely to the rights

of the petitioners, because by the terms of the deed and the charter of the Morris Canal and Banking Company the land could be used for canal purposes only, and the same reverted to the petitioners upon the abandonment of the canal. From the date of the deed of conveyance made by Shipman and others to the Morris Canal and Banking Company (R. 25-55), the said Shipman and others had a vested right in said property, which by and under the laws of the State of New Jersey descended to and became vested in the petitioners, and of which they cannot lawfully be deprived.

The land in question was never dedicated as a highway, because to dedicate presupposes ownership, and at the time of the alleged dedication by the terms of the charter of the Morris Canal and Banking Company (App. 80), neither the State nor the Morris Canal and Banking Company had any title to the said lands, and any seeming attempt by the Legislature of the State of New Jersey in its enactment of 1824, Section 25 thereof (App. 80), to dedicate the canal as a public highway was no dedication whatsoever for the reason that the Legislature plainly said "shall forever thereafter be esteemed a public highway," thereby meaning to deprive the Morris Canal and Banking Company of the right to discriminate between persons desiring to use its facilities; and finally, no valid legislation can be made whereby the petitioners may be deprived of a vested right; and, therefore, any attempt by the Legislature to do so by the enactment of the statutes of 1922, 1923, and 1924 (App. 82, 101, 103), invades the rights secured to the petitioners by the Constitution of the State of New Jersey and by the Constitution of these United States of America.

III.

Reasons Relied On for the Allowance of the Writ.

The reasons why this writ should be granted are:

1. The New Jersey Court of Errors and Appeals, the Court of last resort of the State of New Jersey, by affirming the judgment of the New Jersey Supreme Court, has decided an important question of law affecting the property and vested property rights of these petitioners and a large number of other citizens of the State of New Jersey and of the United States of America, thereby creating and establishing a law contrary to the rule of the common law and repugnant to and violative of applicable provisions of the constitution and statutes of the State of New Jersey, the constitution of these United States of America and the decisions of this Honorable Court, to wit:

(a) That the canal property, including the premises in question, was duly conveyed to the State in 1923 by the Canal Company and its lessee, The Lehigh Valley Railroad Company (R. 9).

(b) That the respondent, City of Newark, did acquire the land mentioned and described in the record herein at pages 25-55 pursuant to the provisions of law.

(c) That the Charter of the Canal Company (App. 65) did not limit it to use the land acquired by it, including the land in question for the purposes of navigation only.

(d) That the conveyance made by Shipman *et als.*, to the Canal Company did not convey an estate upon conditional limitation which terminated upon the abandonment of the canal (R. 10).

(e) That there was no merit in the claim of petitioners that the conveyance made by Shipman *et als.*, to the Canal Company conveyed only an estate upon conditional limitation which terminated upon the abandonment of the canal (R. 10).

(f) That other acts of the New Jersey Legislature, to wit: those acts relating to the abandonment of the canal and the disposition of the canal property, are in effect amendments to the Charter of the Canal Company, are *in pari materia* and should be construed together as a whole (R. 10).

(g) That the abandonment of the canal as such does not raise the presumption that the State relinquished its rights in the property (R. 10).

(h) That there has been no change in the use of the land (R. 10).

(i) That there is no reversion in the land to these petitioners (R. 10).

(j) That the respondent, City of Newark, as successor in title to the Canal Company, acquired a good and valid title to the land in question from the State of New Jersey (R. 10).

2. That the New Jersey Court of Errors and Appeals, by the affirmance of the judgment of the New Jersey Supreme Court in this cause has decided an important question of law effecting the property and vested property rights of these petitioners and others of like situation and in like circumstances, thereby creating and establishing, by precedent, a law which is contrary to the rule of the common law, contrary to existing statutes and precedents of the State of New Jersey, repugnant to and violative to the constitution of the State of New Jersey,

repugnant to and violative of the constitution of these United States of America, and contrary to the decisions of this Honorable Court in that such law, so created and established:

(a) Amounts to the taking of private property for a public use without just compensation contrary to and in violation of Section 16 of Article 1 of the constitution of the State of New Jersey.

(b) Amounts to a deprivation of the natural and unalienable rights of these petitioners of "acquiring, possessing and protecting property", secured to them and to all inhabitants of the State of New Jersey under the provisions of Section 1 of Article 1 of the constitution of said State.

(c) Amounts to the impairment of the obligation of an existing contract, thereby depriving these petitioners of their vested property and property rights contrary to and in violation of the provisions of Article IV, Sec. VII, Paragraph 3 of the constitution of the State of New Jersey.

(d) Deprives these petitioners of their property without due process of law contrary to and in violation of the fifth and fourteenth amendments of the constitution of these United States of America.

(e) Permits the taking of private property for a public use without just compensation, contrary to and in violation of the fifth and fourteenth amendments of the constitution of these United States of America.

(f) Impairs the obligation of an existing contract thereby depriving these petitioners of their vested property and property rights contrary to and in violation of Section 10 of Article 1, of the constitution of these United States of America.

3. The New Jersey Court of Errors and Appeals, by affirming the judgment of the New Jersey Supreme Court, has decided an important question of law affecting the property and vested property rights of a vast number of people, including these petitioners, to wit: all residents and citizens of the United States of America who have reversionary rights and interests in land, located in the State of New Jersey which have reverted or which will hereafter revert to them under existing contracts in the form of deeds conveying property for a public or semi-public use such as highways, streets, railroads, public buildings, churches, schools, parks, canals, libraries and other specific uses, where such deeds provide that the land shall revert upon the abandonment of such specific use, and thereby created and established, by precedent, a law of the State of New Jersey which is contrary to the Rule of the common law, contrary to the Statutes and precedents of the State of New Jersey, repugnant to and violative of the constitution of these United States of America and contrary to the rulings and decisions of this Honorable Court in that said law, so created and established

(a) Amounts to the taking of private property for a public use without just compensation, contrary to and in violation of Section 16 of Article 1 of the constitution of the State of New Jersey.

(b) Amounts to the deprivation of the natural and unalienable right of all persons in like circumstances with and of like situation to these petitioners, of acquiring, possessing and protecting property, secured to them under the provisions of Section 1 of Article 1 of the constitution of the State of New Jersey.

(c) Amounts to the impairment of the obligation of an existing contract, thereby depriving all those persons of like interest to and in like situation with these petitioners,

of their property and vested property rights contrary to and in violation of the provisions of Article IV, Section VII, paragraph 3 of the constitution of the State of New Jersey.

(d) Deprives all of those persons of like interest to and in like situation with these petitioners of their property without due process of law, contrary to and in violation of the Fifth and Fourteenth amendments of the constitution of these United States of America.

(e) Permits the taking of private property for a public use without just compensation, contrary to and in violation of the Fifth and Fourteenth amendments of the constitution of these United States of America.

(f) Impairs the obligation of an existing contract thereby depriving those of like interest to and in like situation with these petitioners of their property and vested property rights, contrary to Section X of Article 1 of the constitution of these United States of America.

WHEREFORE, these petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the New Jersey Court of Errors and Appeals commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause which was entitled in that Court, Anna S. A. Graf and August Graf, individually, and said August Graf, as executor of the Estate of George C. Shipman, Deceased, Ruth Marsh, Doris Marsh, Blanche Bellows, Amy Williams King, T. Wright Williams and Adelaide S. Williams, Relators-Appellants, vs. City of Newark, Respondent-Appellee, and that the judgment of the said New Jersey Court of Errors and Appeals affirming the judg-

ment of the New Jersey Supreme Court and the judgment so affirmed may be reversed by this Honorable Court, and that these petitioners may have such other and further relief in the premises as may be just.

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

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